The very gratifying announcement has been made that the School will soon possess an oil portrait of Professor Langdell. Last winter the Council of the Law School Association appointed a committee to raise funds for this purpose among both past and present members of the School. The response was exceedingly gratifying; the artist, Mr. Frederick P. Vinton, of Boston, has already finished his work, and it is expected that the formal presentation of the portrait will take place within a few weeks.

THE IMPORTANCE OF "GENERAL USE" IN PATENT DECISIONS.[1] — The case of The Barbed Wire Patent, to appear in 143 U. S. 275, is one of exceptional value. The decision is not inconsistent with the cases which are near it in point of time, in which the grant of a patent was overruled by reason of want of novelty; but the rule which is laid down by Mr. Justice Brown certainly defeats the artificial conclusions which recent discussion has been supposed to support.

The court goes back to the very beginning of the law. There was an organic provision whereby authors and inventors were to receive a reward, — the exclusive enjoyment for a limited period of their writings and discoveries. This provision was meant to give the author or inventor a privilege in return for what he gave the State. For a considerable period the true purpose of this provision was, as far as it related to the useful arts, perhaps too strongly emphasized. The elasticity of the statutes was overtaxed; with the result that the now settled principles concerning reissued patents were developed, and, as an incident, what may be designated the doctrine of "the expected skill of the calling." The rule affecting reissued patents was a logical evolution from what preceded it; but, with the greatest respect, very little can be said to justify the doctrine of "the expected skill of the calling." According to this, the examples illustrative of the state of the art or existing knowledge having been produced, the court, wholly unskilled in the art, proceeded to say whether the example which was the subject of the patent was within the intellectual grasp of a skilled operator in possession of all the factors of knowledge. That some such criterion must necessarily be applied in many cases is obvious; but the rule is none the less arbitrary, and therefore dangerous.

In the case before us the court does not deal directly with questions relating to the "expected skill of the calling," but leaves that hopeless chapter where it is. The syllogism of its argument is, (1) the organic law has offered a reward to the inventor; (2) the inventor is he who gives the public a new tool or formula (3) whether the tool or formula is new is a question of fact to be determined upon evidence; (4) the most convincing evidence is the acceptance, indorsement, and use of the tool or formula by the public; and (5) the deductions from the act of the public cannot be displaced by testimony which leaves any room for reasonable doubt.

The patent in question was sought to be invalidated on the ground that it was wanting in novelty; and in support of this defence a great mass of evidence was produced. In his opinion, Mr. Justice Brown refers specifically to numerous instances in which devices very closely resembling

---

[1] We are indebted to Rowland Cox, Esq., of New York for the following note on the case of The Barbed Wire Patent.

that of the patentee are shown and described, and after pointing out the technical differences, emphasizes the fact that the sales of the subject of the patent indicated a phenomenal demand for it, while the demand for the old devices had been in each instance too small to be worth consideration.

"Under such circumstances," it is said, "courts have never been reluctant to sustain a patent to the man who has taken the final step which has turned a failure into success. In the law of patents it is the last step that wins. . . . There was evidently, prior to Glidden's application, more or less experimenting in a rude way. . . upon the subject of barb wires as applied to wire fences; and we think that it is quite probable that coiled barbs were affixed to single wires before the Glidden application was made. We are not satisfied, however, that he was not the originator of the combination claimed by him. . . . It is possible that we are mistaken in this. But it was Glidden, beyond question, who first published this device, put it upon record, made use of it for a practical purpose, and gave it to the public, by whom it was eagerly seized upon, and spread until there is scarcely a cattle-raising district of the world in which it is not extensively employed. Under these circumstances, we think the doubts we entertain concerning the actual inventor of this device should be resolved in favor of the patentee."

There can be no doubt about the significance of this generalization. It does not go beyond the requirements of the case; but the case was a marginal one, and for this reason the generalization is valuable. To defeat a meritorious patent there must be (1) "*knowledge*" and (2) "*existing* knowledge." There must be in the past a thought which matches the thought of the patentee, and that thought must have taken root. The circumstance that the same concept may as a problem or conjecture for a limited period have occupied another mind, does not affect the right of the mind that solved the problem. It may even be that the solution itself took form in the mind which at an earlier date had the problem before it. But unless the solution was seen and understood to be a solution, the right of the patentee who published it and gave it place and certainity in the arts is unaffected.

Mr. Justice Brown's opinion may be said to be distinctly ethical in its nature. It construes the contract between the patentee and the public as it ought to be construed in a court of equity, and is in effect an announcement that wherever the public have received the benefit which should be the foundation of a patent, the grant will, if possible, be held good.

"ACCEPTANCE" UNDER THE STATUTE OF FRAUDS; THE LATE ENGLISH DOCTRINE SLIGHTLY SHAKEN. — The case of *Taylor* v. *Smith*, 67 L. T. Rep. N. S. 39, gives some ground for hope that the doctrine put forth some fifteen years ago as a corollary to *Morton* v. *Tibbett*, — a doctrine as illogical in its origin as absurd in its result, — is held at its true worth by at least a part of the English judges. *Morton* v. *Tibbett* decided merely that a resale of goods before receipt was evidence for the jury of such an acceptance as would satisfy the Statute of Frauds, though it would not cut off a right of action for inferiority to sample. Though there was nothing necessarily misleading in Lord Campbell's language in that case, it was seized upon by the English judges as an excuse for satisfying their dislike for this section of the statute, by making this perfectly reasonable